(2)

No. 04-621

IN THE

Supreme Court of the United States

PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY,
Petitioner,

v.

DYNEGY POWER MARKETING, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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January 6, 2005

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly held that the Federal Power Act bars state law claims seeking to recover alleged overcharges in federally regulated wholesale electricity rates and to enjoin conduct affecting such rates.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents state the following:

Respondent Duke Energy Trading and Marketing, L.L.C. ("DETM") is a limited liability company owned by DETMI Management, Inc. ("DETMI") and Mobil Natural Gas, Inc. ("Mobil Gas"). DETMI, which owns a 60 percent voting and economic interest in DETM, is wholly owned by Duke Energy Corporation, a publicly held corporation. Mobil Gas, which owns a 40 percent voting and economic interest in DETM, is wholly owned by ExxonMobil Corporation, a publicly held corporation.

Respondent Dynegy Power Marketing Inc. is, through intermediate holding companies, a wholly owned subsidiary of Dynegy Inc., a publicly held corporation. A minority interest in excess of 10 percent of the stock of Dynegy Inc. is held by Chevron USA Inc., which in turn is a wholly owned subsidiary of ChevronTexaco Corporation, a publicly held corporation.

Respondent NRG Energy, Inc. is a publicly held corporation. No publicly held corporation owns 10 percent or more of the stock of NRG Energy, Inc.

Respondent Powerex Corp. is wholly owned by the Province of British Columbia, Canada, through the Province's ownership of its parent, the British Columbia Hydro and Power Authority, a provincial crown corporation. No publicly held corporation owns any stock of Powerex Corp.

Respondent Reliant Energy Services, Inc. is a wholly owned subsidiary of Reliant Resources, Inc. Reliant Energy, Inc., a publicly held corporation, owns more than 10 percent of the stock of Reliant Resources, Inc.

Respondents Sempra Energy Trading Corp. and Sempra Energy Resources are wholly owned subsidiaries of Sempra Energy Solutions, which is an indirect wholly owned subsidiary of Sempra Energy, a publicly held corporation.

Williams Energy Marketing and Trading Company changed its name to Williams Power Company, Inc. on August 12, 2003. Respondent Williams Power Company, Inc. is a wholly owned subsidiary of Williams Merchant Services Company, Inc., which is a wholly owned subsidiary of The Williams Companies, Inc., a publicly held corporation.

Respondent Xcel Energy, Inc. is a publicly held corporation. No publicly held corporation owns 10 percent or more of the stock of Xcel Energy, Inc.

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JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

Petitioner (sometimes referred to as "Snohomish") is a municipal utility district in the State of Washington which claims that it paid excessive prices for wholesale purchases of electricity as a result of the California energy crisis of 2000-2001. Snohomish asserts no federal claim in this case, which seeks damages and injunctive relief under California's antitrust law (the Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 *et seq.*) and Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.*). The complaint alleges that Snohomish was injured by "spill over" effects from the California market, where the respondent generators and marketers allegedly engaged in manipulative conduct violating those California statutes.

The district court dismissed the complaint on the basis of this Court's decisions holding that the Federal Power Act ("FPA") preempts matters relating to wholesale elec-

tricity prices, including *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); and *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964). In addition to field and conflict preemption, the district court relied, as an alternative basis for its ruling, on the filed rate doctrine most recently reaffirmed in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*, 539 U.S. 39, 47 (2003). The court of appeals unanimously affirmed on the same alternative grounds, referring to two recent unanimous decisions to the same effect by other Ninth Circuit panels.

Snohomish's petition asks this Court to proclaim that there can be no federal preemption – and therefore the State of California is free to require refunds of wholesale electricity prices and regulate future price-related conduct – because the Federal Energy Regulatory Commission ("FERC") has approved a restructuring of the California energy market in which traditional cost-based rate tariffs have been replaced by tariffs providing for market-based rates determined by the operation of FERC-regulated structural mechanisms. The courts below held that this restructuring did not limit the preemptive effect of the FPA because, in the court of appeals' words, it remains no less true that "FERC has exclusive jurisdiction over interstate sales of wholesale electricity, and continues to engage in regulatory activity." Pet. App. 3a; *see id.* at 24a. That conclusion conforms with this Court's longstanding precedents and the decisions of other courts of appeals.

In the absence of any conflict with the decisions of this Court or any other court of appeals, there is no occasion for plenary review by this Court. Moreover, the fact that the decision below was based on three alternative grounds would independently make this case inappropriate for further review by this Court.

STATEMENT

A. The Regulatory Background

As this Court reiterated in *Entergy Louisiana, Inc. v. Louisiana Public Service Commission*,

> [FERC] regulates the sale of electricity at wholesale in interstate commerce. 16 U.S.C. § 824(b). In this capacity, FERC must ensure that wholesale rates are "just and reasonable," § 824d(a).

539 U.S. at 41. Historically, of course, FERC exercised this regulatory jurisdiction by requiring the filing of tariffs containing cost-based rate schedules. But as the court of appeals explained:

> In 1996, California changed this cost-based system of setting wholesale electricity rates to a market-based system, where the rate was determined in a structured market. . . . The [California] legislation created two non-governmental entities to operate markets and otherwise manage the sale of electricity: the California Power Exchange ("PX") and the California Independent System Operator ("ISO"). These entities were subject to FERC's regulation.

Pet. App. 4a.

FERC authorized this restructuring in a series of orders approving structural tariffs filed by the PX and ISO to regulate the operations of the California wholesale electricity markets, as well as approving participants' individual tariffs providing for market-based prices. The PX (which no longer operates) conducted an auction market where the mechanisms set forth in its FERC tariff set the market-wide price at any given time by analyzing the offers and bids submitted by buyers and sellers. The ISO's FERC tariff provided mechanisms for management of the transmission grid and additional markets, including a "spot" market, which were structured to assure constant balance between supply and demand. The respondent generators and marketers participated in the PX and ISO markets pursuant to their individual FERC tariffs author-

izing market-based rates, and subject to the further requirement that they formally agree to comply with the PX and ISO tariffs. *See id.* at 7a-9a, 14a. In sum, "[t]he allegedly improperly inflated rates paid by [petitioner] are those that resulted from the tariffs filed and approved by FERC." *Id.* at 20a.

In approving the PX and ISO tariffs, FERC determined that they constituted an appropriate means of assuring just and reasonable rates. Its approval of the individual seller tariffs was based on its determination that each of the market participants lacked or had mitigated market power, and was subject to the requirement that they file periodic reports so that FERC can reassess that determination and the reasonableness of actual prices. *See id.* at 8a-9a. Thus, "the rates paid by wholesale buyers remained subject to FERC jurisdiction, and subject to FERC review." *Id.* at 24a.

FERC has been actively exercising its jurisdiction over the California wholesale electricity market, including the events of 2000-2001 about which petitioner complains. The Commission is addressing these issues in several proceedings, including the multifaceted docket captioned *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services, etc.* ("*SDG&E v. Sellers*"). *See* Pet. App. 16a. In a series of decisions in that proceeding, which FERC aptly calls the "California Refund Proceeding," FERC has acted to remedy potential flaws in the California market structure, and has provided for the calculation of refunds for charges determined to exceed the just and reasonable level. *See SDG&E v. Sellers*, Order Directing Remedies for California Wholesale Electric Markets, 93 F.E.R.C. ¶ 61,294 (Dec. 15, 2000); *id.*, Order Directing Sellers to Provide Refunds of Excess Amounts Charged for Certain Electric Energy Sales, etc., 94 F.E.R.C. ¶ 61,245 (Mar. 9, 2001); *id.*, Order Establishing Evidentiary Hearing Procedures, Granting Rehearing in Part, and Denying Rehearing in Part, 96 F.E.R.C. ¶ 61,120 (July 25, 2001); *id.*, Order on Proposed Findings on Refund Liability, 102

F.E.R.C. ¶ 61,317 (Mar. 26, 2003); *id.*, Order on Rehearing, 105 F.E.R.C. ¶ 61,066 (Oct. 16, 2003); *id.*, Order on Requests for Rehearing and Clarification, 107 F.E.R.C. ¶ 61,165 (May 12, 2004).

Additionally, FERC has issued an Order to Show Cause, addressed to most of the present respondents, looking toward an administrative hearing on allegations of "gaming and/or anomalous market behavior in violation of the [ISO and PX] tariffs during the period January 1, 2000 to June 20, 2001, that warrant a monetary remedy of disgorgement of unjust profits and that may warrant other additional, appropriate non-monetary remedies." *American Elec. Power Serv. Corp., et al.*, Order to Show Cause Concerning Gaming and/or Anomalous Market Behavior, 103 F.E.R.C. ¶ 61,345, at ¶ 1 (June 25, 2003), *rehearing denied*, 106 F.E.R.C. ¶ 61,020 (Jan. 22, 2004). FERC has also issued detailed rules to govern market behavior in wholesale electricity markets, incorporating those rules in all existing market-based rate tariffs. *See Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, Order Amending Market-Based Rate Tariffs and Authorizations, 105 F.E.R.C. ¶ 61,218 (Nov. 17, 2003). Those rules prohibit any "[a]ctions or transactions that are without a legitimate business purpose and that are intended to or foreseeably could manipulate market prices, market conditions, or market rules for electric energy or electricity products." *Id.* at App. A ¶ 2. The rules further provide for disgorgement of any unjust profits from violation of the prohibition, as well as revocation of an offender's authority to sell at market-based rates. *Id.* ¶ 6. The Ninth Circuit has recently held that FERC's "broad remedial authority to address anticompetitive behavior" also extends to providing refund remedies for failures to comply fully with the periodic reporting requirements. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1015-16 (9th Cir. 2004) (reproduced at Pet. App. 99a, 117a-118a).

B. Proceedings Below

This case, like a number of other cases seeking judicial remedies for alleged wrongdoing in the California electricity market, was assigned by the Judicial Panel on Multidistrict Litigation to Judge Robert H. Whaley of the Eastern District of Washington, sitting by designation in the Southern District of California. Judge Whaley dismissed the complaint in a thorough opinion. Pet. App. 12a-37a (reported at 244 F. Supp. 2d 1072). The dismissal was based on three alternative grounds: (1) that the filed rate doctrine bars claims, like petitioner's, challenging charges under FERC-approved tariffs and related practices (*id.* at 17a-26a); (2) that Congress has federally preempted the field of wholesale electricity rates through the FPA (*id.* at 28a-30a); and (3) that petitioner's "state law claims that seek repayment of wholesale rates found to be excessive under state law standards would inevitably conflict with FERC's exclusive jurisdiction to determine interstate wholesale rates" (*id.* at 31a).

The Ninth Circuit, which has had a series of appeals arising from the California crisis (*see, e.g., id.* at 3a-4a, 31a), affirmed on essentially the same three alternative grounds. *Id.* at 1a-11a (reported at 384 F.3d 756). Like the district court, the court of appeals rejected petitioner's contention that the replacement of traditional cost-based rate tariffs with the FERC-supervised PX/ISO structures for setting market-based rates removed the jurisdictional foundations for federal field and conflict preemption and application of the filed rate doctrine. The court of appeals relied on the more detailed analysis of these doctrines in two recent decisions by other panels: *California ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831 (9th Cir. 2004) (field preemption and filed rate),[1] and *Public Utility District No. 1 of Gray's Harbor County v. Idacorp Inc.*, 379 F.3d 641 (9th Cir. 2004) (field preemption, conflict preemption, and

[1] Amended on denial of rehearing, 387 F.3d 966 (9th Cir. 2004).

filed rate). In particular, the court below relied on the conclusion in *Gray's Harbor*, just a week earlier, that

> the district court was precluded from giving the plaintiff the relief it sought because, to award that relief, the district court would have had to determine a "fair price." . . . [T]his would interfere with FERC's exclusive jurisdiction to set wholesale rates and was therefore barred by field preemption, conflict preemption and the filed rate doctrine.

Pet. App. 9a-10a.

REASONS FOR DENYING THE PETITION

Contrary to the petition's overwrought argument, the decision below does not present any issue meriting this Court's review. There is no conflict, and the decision rests comfortably on basic principles of federalism and preemption that have been settled in this Court for decades.

Petitioner does not dispute that the rates it challenges are interstate wholesale rates, and that they fall within FERC's statutory jurisdiction. Claims for state law remedies with respect to interstate electricity rates were barred under the dormant Commerce Clause even before the Federal Power Act became effective. *See, e.g., Public Utils. Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 90 (1927). And this Court has repeatedly confirmed that "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction . . . . This was done in the Power Act by making [the federal agency's] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Southern California Edison*, 376 U.S. at 215-16; *see also Nantahala Power & Light*, 476 U.S. at 966; *New York v. FERC*, 535 U.S. 1, 20-22 (2002).

This bright line bars both state regulation and litigation under state law. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 584 (1981).

> The reasonableness of rates and agreements regulated by FERC may not be collaterally attacked in state or federal courts. The only appropriate forum for such a challenge is before the Commission or a court reviewing the Commission's order.

Mississippi Power & Light, 487 U.S. at 375; *see id.* at 377 (Scalia, J., concurring) ("It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.").

1. This case does not present any unsettled issue regarding the filed rate doctrine, much less do so in a framework suitable for this Court's review.

The petition largely focuses on the filed rate doctrine, arguing that it cannot apply where specific rates are not literally "filed" for advance review as they were under traditional cost-based tariffs. Even if that argument articulated an unresolved question, it would not warrant this Court's review because the decision below relied on the filed rate doctrine only as an alternative ground. The court of appeals' judgment rests independently on settled principles of both field preemption and conflict preemption, each of which was itself an alternative ground for decision. This case would thus be an inappropriate vehicle for further review unless this Court deemed that all three of these issues warranted plenary consideration, including a revisitation of this Court's settled precedents on field and conflict preemption.

In any event, there is no open question regarding the applicability of the filed rate doctrine here, in view of this Court's very recent decision in *Entergy* applying that doctrine to a similarly nontraditional tariff structure. *Entergy* – which the petition does not mention – held that state law was preempted under the filed rate doctrine notwithstanding the nonspecific nature of the FERC tariff in question, which "delegate[d] discretion to the regulated entity to determine the precise cost allocation" between affiliated companies that was being challenged. 539 U.S. at 42. This Court held that the cost allocation "consti-

tutes 'the sale of electric energy at wholesale in interstate commerce'" within the meaning of the FPA. *Id.* at 43 n.1. It then rejected the argument that the filed rate doctrine is limited to tariffs providing "specific mandates," holding that "[i]t matters not whether FERC has spoken to the precise classification . . . , but only whether the FERC tariff dictates how and by whom that classification should be made." *Id.* at 49-50. The ISO and PX tariffs and participants' individual tariffs similarly dictate "how and by whom" rates will be established, subject to FERC's review.

The court of appeals' interpretation of the filed rate doctrine is also consistent with the decisions in other circuits. The First Circuit has likewise rejected claims that "the filed rate doctrine should not apply where the 'regulated' rates have been left to the free market." *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000). There, as here, it sufficed that "FERC is still responsible for ensuring 'just and reasonable' rates and, to that end, wholesale power rates continue to be filed and subject to agency review." *Id.* Decisions by the D.C. Circuit hold more broadly that market-based rate tariffs are entitled to the same respect and legal effect under the FPA (and the equivalent Natural Gas Act) as traditional tariffs that list specific rates. *See Elizabethtown Gas v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998).

The filed rate cases on which petitioner relies are irrelevant, particularly in the federal-state preemption context in which that doctrine was applied below. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990), held only that the Interstate Commerce Commission was required to enforce a filed tariff as published and could not authorize secret negotiations inconsistent with the tariff. *Security Services, Inc. v. Kmart Corp.*, 511 U.S. 431 (1994), held that a motor carrier could not enforce a tariff that did not comply with regulations promulgated

by the Interstate Commerce Commission. *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), held that the Federal Communications Commission could not, consistent with the Communications Act of 1934, excuse telephone carriers from filing any tariff at all. None of the filed rate cases cited in the petition involved market-based tariffs or analogous tariffs, and all preceded this Court's *Entergy* decision.

2. The court of appeals' alternative holdings of field and conflict preemption are plainly mandated by this Court's precedents and do not conflict with any other appellate decision.

Petitioner's argument with respect to field and conflict preemption does not address this Court's precedents establishing that the FPA precludes any state law remedy which, like that sought by petitioner, would alter interstate electricity rates. *Entergy* confirms that the fact that the tariffs do not specify precise numerical rates makes no difference in these contexts as well, because the tariffs do dictate by whom and how rates will be determined in a market structure that FERC has approved – subject to ongoing review – as calculated to result in fair and reasonable charges. "[T]he 'view that the pre-emptive effect of FERC jurisdiction turn[s] on whether a particular matter was actually determined in the FERC proceedings' has been 'long rejected.'" *Entergy*, 539 U.S. at 50 (quoting *Mississippi Power & Light*, 487 U.S. at 374). The controlling factor is that the actual charges determined by operation of the individual respondents' tariffs and the price-setting mechanisms specified in the PX and ISO tariffs remain fully subject to the FPA and FERC's exclusive ratemaking jurisdiction. As noted above, FERC is actively exercising that jurisdiction over the very subject matter of this complaint.

Petitioner's contention that preemption is improper because it leaves California's antitrust and unfair competition laws unenforced ignores the fundamental nature of preemption:

> Every pre-emption case involves a conflict between a claim of right under federal law and a claim of right under state law. A finding that federal law provides a shield for the challenged conduct will almost always leave the state-law violation unredressed.

Arkansas Louisiana Gas, 453 U.S. at 584.

The decision below does not call into question the broad principle that the FPA does not provide blanket antitrust immunity for the electric power industry. That principle, which is in any event not without qualifications, does not extend to permitting state courts (or federal courts applying state law) to regulate interstate electricity rates by providing refunds whenever they are deemed to have been anticompetitive. The case on which petitioner principally relies in this respect, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), did not involve any question about preemption of state remedies. *Otter Tail* merely held – as the district court explained, *see* Pet. App. 35a-36a – that the FPA did not impliedly repeal the *federal* antitrust laws with respect to a subject (the wheeling of power) that was then outside the statutory jurisdiction of FERC's predecessor. Indeed, this Court noted that any issue concerning rates and conditions of service would be under the jurisdiction of the federal Commission. *See* 410 U.S. at 375-376.

The refunds that petitioner seeks under state law would necessarily intrude upon and conflict with the jurisdiction that is solely entrusted to FERC under the FPA and that FERC is actively exercising. Accordingly, petitioner's complaint is plainly barred, as the courts below held, by both field and conflict preemption. It is barred by field preemption because it is an "effort to invade the province of federal authority," *Mississippi Power & Light*, 487 U.S. at 377. And it is barred, alternatively, by conflict preemption because it would "stand[] as an obstacle to the accomplishment of the full purposes and objectives of Congress," *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988), by "present[ing] the 'prospect of interference

with the federal regulatory power'" over rates, *id.* at 310 (citation omitted).

This Court has consistently rejected petitioner's argument that preemption can be avoided by characterizing the sought-for state law remedy as complementing or augmenting the federal scheme established by Congress. *See Nantahala Power & Light*, 476 U.S. at 966 ("'[O]ur decisions have squarely rejected the view . . . that the scope of [FERC] jurisdiction over interstate sales of gas or electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest.'") (quoting *Southern California Edison*, 376 U.S. at 215); *see also United States v. Locke*, 529 U.S. 89, 115 (2000).

Petitioner cites no case – much less any federal court of appeals decision – where a complaint seeking recovery of allegedly excessive federally regulated rates was allowed to proceed under state law.[2] The only decision that the petition characterizes as creating a specific conflict in the lower courts, *In re Mirant Corp.*, 378 F.3d 511 (5th Cir. 2004), did not involve any preemption issue or state law claim. Rather, that decision concerned the intersection between the federal Bankruptcy Code and the Federal Power Act, holding only that the bankruptcy court could

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[2] *Younger v. Jensen*, 605 P.2d 813 (Cal. 1980), held only that the Natural Gas Act did not preclude the California Attorney General from conducting an *investigation* into possible antitrust violations. The state court was at pains to emphasize that "[t]he issue posed . . . [was] not the validity of hypothetical steps California might take to *enforce* its antitrust laws," *id.* at 817 (emphasis added), and it noted that one purpose of the investigation could be merely "recommendations for remedial administrative rulings," *id.* at 818.

Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469 (7th Cir. 1991), did not involve, as this case does, a claim that a seller's prices were unlawful, but rather a claim that a monopoly pipeline refused to carry cheaper gas that the plaintiffs could have purchased from certain third-party sellers. The Seventh Circuit simply noted, consistent with *Otter Tail*, that the pipeline was not categorically immune from antitrust liability and then proceeded to affirm a judgment in the defendant's favor.

authorize rejection of an executory contract for purchase of electricity by the debtor.[3] There is thus no colorable claim of conflict for this Court to address.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3] Even in the bankruptcy context, *Mirant* does not at all hold that courts can entertain any claim so long as the effect on FERC-regulated rates is only "indirect" (Pet. 24). In holding that Congress did not intend that the FPA should deprive utilities of a fundamental remedy provided by the Bankruptcy Code, the Fifth Circuit noted that the seller retained an unsecured claim for breach of contract "based on the amount of electricity it would have otherwise sold to Mirant *at the filed rate*." 378 F.3d at 520. The court deemed its holding consistent with this Court's holding in *Arkansas Louisiana Gas*, 453 U.S. at 584-85, that "courts are preempted from awarding . . . damage awards calculated using a rate other than the rate filed with FERC." 378 F.3d at 519.

Respectfully submitted,

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